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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GARY TORRES, Defendant and Appellant.	B210100 (Los Angeles County Super. Ct. No. PA057295)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Reversed in part and Affirmed in part and Remanded.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Joseph Gary Torres of a series of sex offenses against two minor girls, C.S. and R.S.[1] The trial court sentenced him to 32 years 4 months in state prison. He appeals, contending: (1) the trial court abused its discretion by "forc[ing] unwanted retained counsel on [him] without good cause or informing [him] of his absolute right to 'fire' retained counsel if he wanted to represent himself"; (2) the court's ruling also deprived him of his federal constitutional right to counsel of his choice and to self-representation, and his state constitutional right to counsel of his choice; (3) the conviction of continuous sexual abuse of C. (count 1) must be reversed for insufficiency of the evidence and because the court failed to instruct on lesser included offenses; and (4) the conviction of forcible sodomy of R. (count 9) must be reversed for several alleged instructional errors and because the evidence was insufficient.

We conclude that the trial court properly denied defendant's request to discharge his retained counsel. However, we find the evidence insufficient to support the conviction of continuous sexual abuse of C. We further conclude that none of defendant's challenges to his conviction of forcible sodomy of R. has merit. We therefore reverse the conviction on count 1, but otherwise affirm the judgment, and remand for resentencing in light of the reversal of count 1.

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[1] All undesignated section references are to the Penal Code. As to C., the jury convicted defendant of continuous sexual abuse (§ 288.5, subd. (a)), lewd act upon a child (§ 288, subd. (c)(1)), sexual penetration by a foreign object (§ 289, subd. (i)), four counts of oral copulation of a person under 18 (§ 288a, subd. (b)(1)), and sodomy of a person under 18 (§ 286, subd. (b)(1)). As to R., the jury convicted him of forcible sodomy (§ 286, subd. (c)(2)), and two counts of lewd act upon a child. The jury found the multiple victim enhancement allegation under Penal Code section 667.61, subdivision (b), to be not true.

BACKGROUND

1. *The Church*

C.S. (born in July 1988[2]) and R.S. (born in January 1991) are the daughters of Antonio S. and his wife, Priscilla S., who also had three other children. Priscilla home schooled them all.

In 1985, Antonio formed a Bible study group for Hispanics in Sunland. It later grew into the church of Iglesia Bautista Reformada de Sunland with about 50 members. Antonio was the first pastor of the church, but after three or four years he stepped down and defendant, who was an early member of the church, became the pastor. According to Rudy Segura, another member of the church, after becoming pastor defendant exercised firm control over church members and their activities by passing judgment on what might offend God and their religion. According to Ernesto Granados, another church member, defendant expected strict obedience from all church members in every aspect of life, and failure to obey would result in ostracism within the church community.

Antonio and his family were close to defendant and his family. Antonio's children spent a great deal of time with defendant and his children. Because defendant was their pastor and friend, Antonio and Priscilla encouraged their children to seek guidance from defendant regarding any problems they might have.

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[2] There is a discrepancy in the record regarding C.'s birthday. Priscilla testified that C. was born "6/20 of '88." However, C. repeatedly testified that she was born on July 20, 1988. In charging count 1 (continuous sexual abuse of C. in violation of § 288.5), and at trial, the prosecution relied on the date of July 20, 1988. Respondent likewise relies on that date on appeal. We do so as well.

2. *Sexual Abuse of C.*

C. turned 13 on July 20, 2001, and 14 on July 20, 2002. She was 19 at the time of trial.

After she turned 13, she had questions about her own salvation. She had known defendant her whole life, and called him Uncle Jose. When he became pastor, she believed that he had the answers for all spiritual questions. Around April when she was 13, she began regular counseling sessions with defendant on Sunday evenings, and sometimes after prayer on Thursday evenings.

The counseling sessions occurred in a counseling room at the church. The door to the room would be closed but not locked. C. would ask defendant questions about defendant's sermon, and defendant would sit behind a desk and tell her examples of areas of her life where she needed improvement. Defendant was very affectionate toward her, saying that she was a very special girl and had a special place in his heart. But defendant set difficult standards for salvation. Because C. did not believe she could meet them, she would cry a lot during the sessions.

Over time at the counseling sessions, defendant began hugging C. on the premise of comforting her. He would lead her to a corner of the room behind the door, and give her a "simple hug." The simple hugs began in April of her 13th year.[3] The simple hugs occurred at least once a week, "probably" until just after her 14th birthday.

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[3] As we explain, below, in our discussion of defendant's contention that the evidence is insufficient to support his conviction of continuous sexual abuse, C.'s testimony was not entirely clear as to the month and year the hugging started. She first testified that the simple hugs began in "May, April, somewhere around there" when she was 13, meaning (given her birthday) April 2002. She also testified that the hugging "probably starting in May when [she] was getting more emotional." Later, she asked to change her testimony to coincide with notes she had made, and testified that the hugs

Sometime in June or July when C. was 13, C. began talking to defendant about the boxing class he attended with his family.[4] One day at a high school track defendant told C. that he would show her some of the stretches they would do at the boxing class. As defendant instructed her, he would touch her thighs, saying that this was the area that would be worked out in class.

Through her counseling sessions, C. became more attached to defendant and less attached to her parents. Defendant would tell her that he looked on her as a daughter, and she felt that she wanted to please him in her spiritual development.

Once, apparently when she was 14, C. was at Universal Studios with defendant and one of her friends. Although she was afraid to go into an exhibit called the "Mummy's Maze," defendant insisted that she do so to face her fears and said he would protect her. Defendant grabbed her from behind below her chest and took her through the maze. Thereafter, at their counseling sessions, defendant said that they could hug like that. Although C. was reluctant, defendant made it sound like he thought the hugs were helping her, and he would do it without asking. C. believed that she was 14, and that these hugs continued until she was 16 or 17.

After she turned 14, defendant would counsel C. on spiritual topics, but then turn the conversation to her body, saying that she should attend boxing class and

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started in April. The prosecutor asked, "Of 2000 . . . when you were 13?" C. replied, "Yes." Although in this latter question the prosecutor misstated the year – 2000 rather than 2002 – C.'s testimony in response, reasonably construed, referred to April 2002, while she was 13, rather than April 2000, when she would have been 11.

[4] C. testified that this incident occurred "[s]ometime in July or June of the year I was 13, I think that was 2001." As we explain in our discussion of defendant's claim of insufficiency of the evidence to support the continuous sexual abuse conviction, we construe C.'s testimony to refer to June or July of 2002, when she was 13.

work out. He would touch her legs, thighs, and hips. Also around this time, C. became very emotional about defendant attacking her father's character. Defendant suggested more intimate hugs might be required to comfort her. Defendant would sit in a chair in the corner of the counseling room behind the door, which was now locked, and have her sit on his lap facing him with her legs straddling him. Defendant would hug her tightly. By this time, C. was attending counseling with defendant every Sunday evening and sometimes at midday after one of the three church services. The more intimate hugs occurred after each session until C. was 15.

On her 15th birthday, defendant took C. on a walk to the home of the church treasurer, Diane Childs. No one else was there. C. was then attending boxing class, and defendant asked her to pull down her pants so he could check how much fat she had to burn. C. resisted, and defendant became upset, asking why she was embarrassed and accusing her of not trusting him. Defendant then helped her pull down her pants just below her underwear and said that he just wanted to point out her thigh muscle. He then touched her inner thigh, close to the crotch. C. was trying to pull her pants up, and after about 20 seconds was able to do so. In talking about her thigh muscle, defendant asked whether she knew anything about sex. She said that she did not, and defendant was surprised, saying that she had been deprived. He said that it was very important at her age to know everything about sex so that she could keep herself pure but go into marriage knowing it all. He then explained "everything about sex," how "sexual intercourse takes place . . . and how someone gets pregnant." Defendant had her sit on his lap and he demonstrated sexual intercourse using two fingers to simulate legs and a thumb to simulate a penis. That encounter ended with one of the intimate hugs.

In August of C.'s 15th year, she and defendant's children were helping fix the roof of another church member's home. Defendant took C. inside the house and showed her another type of hug. One of her pant legs was off, and she wrapped her legs around him. He pushed her closer to him so that her vaginal area under her underwear touched his lower stomach area. This hug occurred perhaps every week. Defendant "got [her] used to it by doing it over and over and over." Defendant would also hug her from behind, putting his arms or hands on her breasts over her clothing.

Defendant kept teaching C. about sex, telling her that it was very important that she learn. One day, when she was 15 or 16, he wanted to touch her vagina to see how she had developed. He had her pull down her pants and underwear, felt her vagina, and inserted his finger. Thereafter, defendant frequently repeated the act – his "checkup" -- during counseling sessions. He said that he could tell when she was fully developed and ready for marriage. When defendant would insert his finger, C. would tell him that it really hurt, and he would stop. But once he told her to trust him and he inserted his finger a half inch or so.

When C. was 16, defendant began simulating sodomy with her, pressing against her with his bare penis while she was clothed in pants. The first time he actually sodomized her, when she was 16, he used a condom. Defendant told her that allowing him to sodomize her helped with his high blood pressure, and he would show her charts to show how his blood pressure went down.

Defendant instructed C. in oral copulation. When she was 17, she took a trip with defendant and his family to DisneyWorld. During the trip, while in Virginia, defendant took her to a hotel room and said that this would be a test of how good she was. Defendant unzipped his pants and had her orally copulate him. After

they returned home, he had her orally copulate him at least 10 times at his church office before she turned 18.

Sometime in 2005 or 2006, Magda S., C.'s aunt, saw defendant and C. in defendant's church office. Defendant was seated, and C. was bent over with her face perhaps only two inches from defendant's lap.

3. *Sexual Abuse of R.*

R. was 17 at the time of trial. When she was 14, she saw a photograph of a mother breast feeding a child. She later exposed one of her breasts to a child, after which she confessed the incident to her parents. Her parents consulted defendant, who later asked R. to come with him to the church for counseling.

That day, in August 2005, on the stairs leading to defendant's church office, defendant brought up the incident with the child, and asked if there was anything she was curious about concerning her body. She told him that there were little bumps on her breast that she was curious about. Defendant asked to see them, and she lifted her shirt and bra. Defendant asked if he could touch them, and she said yes. Defendant then "squished" her nipple and felt around it. He said that he would check again, because he thought they were bumps of irritation.

Thereafter, R.'s counseling sessions with defendant occurred either once a week or three times a month. During those sessions, defendant would touch her breasts and teach her sex education.

Once he asked her if she touched her vagina. She said that she had touched around that area. Defendant then touched the lips of her vagina under her clothing, and asked her to indicate how far she had touched, but she did not know if he penetrated her. Such touching occurred six or eight times while R. was 14, and perhaps nine to twelve times when she was 15. When this touching occurred,

occasionally he would tell her to remove her pants or lift her skirt. He did it "like not in a commanding voice, but in a sense that [she] needed to do it." R. explained: "He put a lot of fear in my heart, and I feared this man, and I feared that if I didn't do what he said, I would be in trouble. . . . If I didn't comply with what he told me to do, or complained about it, . . . I feared that I wouldn't be able to go out with his kids and their outings, and I would just be an outcast from that group." The touching would occur on the reclining sofa, on the floor, or as she was bending over the staircase.

Defendant talked to R. about her weight. He said that she was overweight and needed to lose weight so that she could have sex with her husband when she married. He would have her remove her pants and bend over the staircase. He would stand behind her and push against her, to show that his penis could not reach her vagina.

Defendant also demonstrated sexual positions, having her undress and directing her to assume various positions. He would then touch her vagina or breasts.

On her 15th birthday, at his mother-in-law's house, he positioned her on her back on the bed with her legs above her head and he pressed his body between her legs.

On one occasion, defendant asked her if she knew how to have oral sex. She said no. He told her to "bite in the area where his penis was." At the next counseling session, R. told defendant that she was uncomfortable doing that. Defendant replied that she needed to be humble and practice on him because her husband would want her to do it. On a later occasion, when she was 15, in a storage room at the church, defendant asked R. to kneel and bite in the area of his penis and to move her mouth over the area.

Defendant would tell R. that sex was not all pleasure and also involved pain, and that he was trying to demonstrate that to discourage her from having sex with someone out of marriage. On one occasion, he tried to demonstrate that when the penis enters the vagina it is painful. He demonstrated by putting his finger in her rectum.

In June or July of 2006, he put his penis in her rectum. Defendant told her that putting his finger in her anus was not enough to show her the pain of sex, and he wanted to demonstrate it better by inserting his penis. R. was "very scared and . . . didn't really want to do that. But . . . he used his smart words to try to convince [her]." He talked to her about her need to sacrifice and learn that sex was not all pleasure but also involved pain. She was also concerned about his position in the church and his opinion of her. She wanted to earn his favor and be included in the group of church children that included his children. He told R. that if she started to feel pain, he would stop. R. agreed to let him do it.

They went into a room adjacent to the sanctuary. Defendant had R. remove her pants and underwear and bend over a staircase. He then put his penis in her anus. R. felt pain and told him so. Defendant asked, "Can you stand it?" After a moment and with hesitation in her voice, she answered yes, even though she did not want him to continue. Defendant then pushed deeper, increasing the pain. After five to ten seconds, he withdrew.

4. *Defendant's Admission of Molestation*

In September 2006, there was an investigation concerning irregularities in the running of the church. Antonio and Frank Barker, a pastor from an affiliated church in New Jersey, questioned Antonio's daughters. As a result of what they said, a meeting was held on September 13, 2006, attended by defendant, Antonio,

Pastor Barker, two other pastors from East Coast churches with which the Sunland church was affiliated, and two other members of the Sunland church. Pastor Barker asked defendant if there had been any sexually immoral acts in connection with children of the church. Defendant hesitated and said, "Yes." He then looked at the ground and said to Antonio, "I'm sorry, Tony."

5. *The Process of Grooming*

Los Angeles Police Detective Robert Cervantes, an expert on child exploitation, explained the "grooming" process used by child molesters to obtain the trust of their victims. According to the Detective, most child molesters begin with acts such as hugs, massages, or a kiss, and will spend a lot of time and money on a particular victim. Once the child accepts such conduct, the molester begins to perform progressively more "egregious" acts. Many victims do not report the molestation because they trust and like the molester.

DISCUSSION

I. *Denial of Request to Discharge Retained Counsel*

Defendant contends that the trial court abused its discretion in denying his request to discharge his retained attorney. He asserts that the court's ruling violated his state and federal constitutional right to counsel of his choice, and his federal constitutional right to self-representation. We disagree.

A. *Procedural Background*

Represented by retained counsel, Kristine Burk, defendant was arraigned on the information on December 28, 2006, and trial was set for February 22, 2007. On February 13, 2007, another attorney from Ms. Burk's firm, Samuel Long,

substituted in as counsel. The trial was later set for May 8, 2007, and then continued to July 9, 2007.

On July 9, 2007, the court granted Mr. Long's motion to be relieved because "the law firm that he is engaged in is bankrupt and counsel . . . is basically without a job." The court appointed the public defender to represent defendant, and granted a brief continuance to July 16, 2007.

On that date, defendant substituted in retained counsel Walter Urban. The court set the trial for October 16 as day 0 of 10. Thereafter, on defense motion, the court continued the trial five times, ultimately to March 17, 2008, when defendant moved to relieve Mr. Urban and substitute in new counsel, Louisa Pensanti. Addressing Ms. Pensanti, the court noted that it was "concerned" because the case was "on the oldest case list, and a case of this nature under [section] 1048 of the Penal Code . . . should be tried quickly.[5] Your client's desires are important, but I need to find out what is the minimum time that you can be prepared [so as to] give a competent job in this case." Ms. Pensanti responded that she could be ready within 30 to 45 days. The court then allowed the substitution. Attempting to work around the prosecutor's vacation and ensure sufficient time for Ms. Pensanti to prepare and for the prosecutor to fly in her witnesses, the court set a trial date of June 13, 2008, as day 0 of 10.

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5 Section 1048, subdivision (b) provides in relevant part: "[A]ll criminal actions in which . . . any person is a victim of an alleged violation of Section . . . 286 . . . committed by the use of force, violence, or the threat thereof, shall be given precedence over all other criminal actions in the order of trial. In those actions, continuations shall be granted by the court only after a hearing and determination of the necessity thereof, and in any event, the trial shall be commenced within 30 days after arraignment, unless for good cause the court shall direct the action to be continued, after a hearing and determination of the necessity of the continuance, and states the findings for a determination of good cause on the record."

When the case returned on June 13, 2008, defendant asked to address the court about changing his attorney. The court stated that it was familiar with the recent decision in *People v. Keshishian* (2008) 162 Cal.App.4th 425 (*Keshishian*), which affirmed the denial of a request to discharge retained counsel, made on the day of trial. As the trial court observed, "[t]he applicable test for the discharge of retained counsel is that the trial court should balance defendant's interest in new counsel against the disruption, if any, flowing from the substitution. . . . The bottom line under *Keshishian* [is] that the right to counsel cannot mean the defendant can continue to delay his day of judgment by discharging prior retained counsel." The court then excused the prosecutor from the courtroom and heard defendant's request, observing that defendant had then spent "639 actual days in custody."

Defendant explained in relevant part: "I've been trying to have . . . a proper defense. . . . [T]he first attorney went bankrupt. It was not an issue of me trying to manipulate the system. . . . The second attorney . . . was never available to me, and now as I hired this new law firm, I've been asking for an investigation of my case. The investigation has not been fulfilled by neither one of the attorneys. . . . My attorney here Louisa [Pensanti] would state the first time that the case was given to the investigator [it] was given to the wrong investigator. Secondly, the investigator that finally got my case came to visit me two weeks ago, and as you know, . . . there is several weeks since my counselor has taken over this case. This investigator has been working two weeks on my case, went to the wrong address, spoke to the wrong people. And I just have lost much confidence in the work that has been performed. . . . I plead that you give me . . . a fair chance to defend myself, sir."

Ms. Pensanti informed the court that her investigator had gone "to the wrong church." However, Ms. Pensanti had informed defendant "that that could be rectified very, very quickly," and "that we would be ready for trial."

Defendant then stated that he had another attorney, Leonard Levine, who could appear if necessary, and that the "process of money is being transferred" to retain him. The court asked, apparently rhetorically, "But he is not ready for trial, is he?", and denied the request to discharge Ms. Pensanti. The court reasoned: "This is almost on all fours with the *Keshishian* case, sir. It's time for judgment. I'm not going to let you play games anymore. Your attorney is extremely competent. She is very, very good in what she does. The fact that you have lost confidence in her on this day of trial after this case has been pending for over almost two years, is insufficient for me to discharge your retained attorney and allow a new attorney to come in."

After the prosecutor returned, there was a brief discussion concerning the prosecution's plea offer. After defendant rejected the offer, the court trailed the case four days to June 17 (Friday to Tuesday) in order to obtain jurors. On June 17, Ms. Pensanti requested a brief continuance, because the prosecutor had filed that day an amended information alleging a multiple victim enhancement under section 667.61, subdivision (b), which carried a potential life sentence. The court decided to begin jury selection, but to postpone the beginning of evidence to June 23. Jury selection then began on June 17, and was completed the next day. The court then continued the case to June 23, 2008, for the beginning of evidence.

B. *Analysis*

In *Keshishian, supra,* 162 Cal.App.4th 425, we affirmed the trial court's denial of a defendant's request to discharge his retained counsel, made when the

case was called for trial. The defendant, who was charged with murder, informed the court that he had "'lost confidence pretty much'" in his attorneys, and wanted a continuance to obtain another attorney. (*Id.* at p. 428.) The case had been pending for two and a half years, and the prosecution objected to any continuance given the age of the case and difficulties with its witnesses. The trial court denied the request, and we affirmed the ruling.

We observed: "'The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state [citations] . . . .' [Citation.] While a defendant may discharge appointed counsel only if that lawyer is rendering inadequate representation or there exists an irreconcilable conflict between counsel and client [citation], he or she may discharge retained counsel for any reason. [Citation.] The right to discharge retained counsel is not, however, absolute. The trial court may deny a request to discharge retained counsel 'if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice" [citations].' [Citation.] '[T]he "fair opportunity" to secure counsel of choice provided by the Sixth Amendment "is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time.'"' [Citation.]" (*Keshishian, supra*, 162 Cal.App.4th at p. 428.)

We concluded that in ruling on a request to discharge retained counsel, the court should "'balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.' [Citation.] In so doing, the court 'must exercise its discretion reasonably: "a myopic insistence upon

expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'" [Citation.]" (*Keshishian, supra,* 162 Cal.App.4th at p. 429.)

Applying this test to the facts in *Keshishian,* we found no abuse of discretion: "The court here applied the correct standard in rejecting appellant's last-minute attempt to discharge counsel and delay the start of trial. Appellant asked for and was given an opportunity to address the court concerning his desire to discharge counsel and his reasons for doing so. He stated only that he had 'lost confidence' in his attorneys. This request was made on the day set for trial after the case had been pending for two and a half years. An indefinite continuance would have been necessary, as appellant had neither identified nor retained new counsel. Witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay. '"The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,'" and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel. [Citations.] That appellant had inexplicably 'lost confidence' in his experienced and fully prepared counsel did not constitute good cause for granting the continuance requested, nor justify the disruption to the judicial process that would have ensued. The trial court did not err in denying the request." (*Keshishian, supra*, 162 Cal.App.4th at p. 429.)

Here, as in *Keshishian,* the trial court applied the correct standard, and did not abuse its discretion in denying defendant's request to discharge his retained attorney. Defendant made his request on the day set for trial. More than 17 months had passed since he was arraigned on the information. Defendant wanted to discharge his attorney because the defense investigator had gone to the wrong church to interview witnesses, leading defendant to lose confidence in his attorney.

But as defense counsel noted, she could rectify that problem "very, very quickly" and would be ready for trial. Defendant stated that he was in the process of retaining another attorney, who was available to appear. But that attorney clearly would not have been ready to try the case, and a substantial continuance would necessarily have been required given the complexity of the charges (11 sex offenses) and the possible sentence. Indeed, when Ms. Pensanti took over as defendant's attorney in March 2008, she informed the court that the minimum time within which she could be ready to try the case was 30 to 45 days. We note, too, that the prosecution had to fly in its witnesses, making it all the more difficult to arrange a continued trial date at which those witnesses could appear and new counsel could be ready. Under these circumstances, we conclude that defendant's lack of confidence in his attorney did not constitute good cause to justify the substantial continuance that necessarily would have been required if new counsel had been permitted to substitute in, and did not justify the disruption to the judicial process that would have occurred. Because the court properly denied defendant's request to discharge his attorney, there is no merit to defendant's claims that his federal and state constitutional rights to counsel of his choice were violated

Defendant contends that the trial court was required to inform him of his right to self-representation. Nothing in the record suggests that defendant wanted to represent himself. In any event, no authority supports the proposition that a defendant whose request to discharge retained counsel is denied must be informed of his right to proceed pro se if he wishes.

II. *Insufficiency of the Evidence As to Court 1 – Continuous Sexual Abuse of C. (§ 288.5)*

Count 1 charged defendant with continuous sexual abuse of C. in violation of section 288.5 committed "[o]n or between July 20, 2000 and July 19, 2002." Section 288.5 required proof that, inter alia: (1) defendant engaged in three or more acts of substantial sexual conduct with C. as defined in section 1203.066, or three or more acts of lewd or lascivious conduct with her as defined in section 288, (2) the acts occurred while C. was under 14, and (3) at least three months elapsed between the first and last charged act. (See *People v. Mejia* (2007) 155 Cal.App.4th 86, 94 (*Mejia*); *People v. Whitman* (1995) 38 Cal.App.4th 1282, 1298.) Defendant contends that the evidence was insufficient to prove these elements. As to the requirement that at least three months elapse between the first and last qualifying act while C. was under 14, we agree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) But "mere speculation cannot support a conviction. [Citations.] To be legally sufficient, evidence must be reasonable, credible, and of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.)

Within the charged time period – on or between July 20, 2000 and July 19, 2002 -- defendant committed no acts of substantial sexual conduct within the

meaning of section 1203.066.[6] The only acts that might qualify as lewd and lascivious conduct as defined in section 288 were the "simple hugs" during C.'s counseling sessions and the touching of C.'s thighs on a single occasion.

As to the hugs, C. testified that during their counseling sessions every Sunday and also sometimes on Thursday defendant would give her a "simple hug," his body touching hers. He would ensure the concealment of the act from the observation others by doing it in a corner of the counseling room behind the closed door. As to the thigh touching, C. testified that at a high school track defendant touched her thighs when explaining stretches for boxing class.

Section 288 "is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) "[T]he lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent. It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as part of a normal and healthy upbringing. On the other hand, any of these intimate acts may also be undertaken for the purpose of sexual arousal. Thus, depending upon the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of section 288. As the vast majority of courts have long recognized, the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances." (*Id.* at p. 450.)

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[6] Section 1203.066, subdivision (b), provides: "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

Here, the jury could reasonably infer from defendant's long history of sexual conduct with C., as well as his history with R., that he took an unnatural sexual interest in C. from the beginning of their counseling sessions, and that defendant repeatedly performed the simple hugs and once touched her thighs not simply to groom C. for future acts of more intimate molestation, but also to sexually arouse himself at the time he performed the acts. Thus, substantial evidence proves that these acts constituted lewd and lascivious conduct. But substantial evidence does not prove that at least three months elapsed between the first and third such act while C. was under 14.

C. testified that she was born on July 20, 1988. (See fn. 2, *ante*.) Thus, she turned 13 on July 20, 2001, and she turned 14 on July 20, 2002.

When first asked by the prosecutor how old she was when the first hug occurred, C. testified that she was 13. At that age, she testified, she was attending counseling with defendant every Sunday and sometimes on Thursday and the first hug occurred "maybe in May, April, somewhere around there." When asked if defendant hugged her every week, she answered, "Probably starting in May when I was getting more emotional." From this evidence, it appears that that C. was referring to April and May of her 13th year, meaning April and May 2002.

Subsequent testimony created some confusion as to the calendar year of the hugging and thigh touching, but none of that testimony constitutes substantial evidence to prove that any qualifying touching occurred any earlier than April 2002. C. referred to the thigh-touching incident at the high school track as having occurred "sometime in July or June of the year I was 13, I think that was 2001." Given her date of birth (July 20, 1988), C. was 12 years old in June of 2001, and did not turn 13 until July 20 of that year. Based on her apparent certitude that the touching occurred in June or July of the year she was 13, and her apparent

uncertainty in referring to the year 2001, the most reasonable interpretation is that she meant June or July of 2002, when she would have been 13 (until July 20), rather than June or July of 2001, when she would have been 12 (until July 20). In any event, this testimony does *not* constitute substantial evidence – reasonable, credible, and solid evidence -- proving that the thigh touching occurred in June or July 2001.

Next, following a recess, the prosecutor asked C. whether, having reviewed notes she had made in preparation for her testimony, she wanted to change her testimony concerning when the hugs started during the counseling sessions. C. said that she did, and that the first hug occurred in "April." The prosecutor asked, "Of 2000 . . . when you were 13?" C. replied, "Yes." The only reasonable interpretation of this exchange is that C. was confused by the prosecutor's mistake as to the year. C. would have been 11 in April 2000, not 13, and nothing in the record suggests that she meant to testify that she was 11, as opposed to 13, when the hugging began.

The confusion continued on cross-examination. Defense counsel asked C. when she first consulted defendant about her salvation, referring to the counseling sessions. C. responded, "It was in April, 2001. So I was 13." Again, it appears that C. was confused as to the date. In April 2001, she was 12, not 13, and given her consistent testimony that the hugs occurred when she was 13, her reference to 2001 cannot be substantial evidence that the hugs began in April 2001 rather than April 2002.

In short, viewing the record as a whole, and drawing all inferences in favor of the prosecution, substantial evidence proved, at best, that the simple hugs began in April 2002, when C. was 13. That is the only reasonable interpretation of her attempt on direct examination to clarify her testimony as to when the hugs

occurred, and no other substantial evidence supports a different date. Further, substantial evidence proved, at best, that the thigh touching occurred in 2002 when C. was 13, between June and her 14th birthday on July 20.

For these acts to satisfy section 288.5, at least three months had to elapse between the first and last such act before C. turned 14. (§ 288.5, subd. (a); see *Mejia, supra,* 155 Cal.App.4th at p. 94.) To meet this requirement, the first qualifying act had to occur at least three months, or 90 days, before July 20, 2002, C.'s 14th birthday, meaning that the act had to occur no later than April 21, 2002. C. testified that the hugging began in April 2002 when she was 13, but she could provide no details from which it could reasonably be inferred *when* in April 2002. Thus, there was no evidentiary basis on which the jury could infer that the first act of hugging occurred on or before April 21, 2002, as required to satisfy the three-month requirement, rather than after that date.

The decision in *Mejia, supra,* 155 Cal.App.4th 86, is instructive. There, the defendant was charged with continuous sexual abuse committed "'on or between June 1, 2004 and September 17, 2004.'" (*Id.* at p. 93.) As described by the court, "the evidence showed defendant first abused [the victim] sometime in June 2004, when she was in eighth grade. There were 10 instances of abuse by defendant between June and the start of ninth grade sometime 'around July' of that year. The victim also testified that during the 12-week period from June through August 2004, defendant molested her more than three times. In September of that year, defendant molested her at least twice. While on direct examination, the victim testified generally that defendant molested her 'two or three days a week,' but she clarified that defendant did not molest her every week within that time period." (*Id.* at p. 94-95.)

The court concluded that this imprecise testimony was insufficient to prove that at least three months had passed between the first and last qualifying act under section 288.5: "[T]he only reasonable inference permitted by the evidence was that defendant's abuse began sometime in June and continued to some date in September—but the jury could only speculate that the first incident occurred early enough in June to satisfy the 90-day requirement expiring on September 17, 2004. Indeed, there was no evidence as to when defendant abused her in September, including whether the abuse occurred before and/or after her birthday. As defendant correctly argues, although there was ample evidence that at least three qualifying sexual offenses occurred during the charging period, there was no substantial evidence that at least three months elapsed between the first and third offenses committed against her as a 13 year old." (*Mejia*, *supra*, 155 Cal.App.4th at p. 95.)

Similarly, in the present case, the jury could only speculate that the first qualifying act occurred early enough in April 2002 – to be precise, on or before April 21 – to satisfy the 90-day requirement before C.'s 14th birthday on July 20, 2002. While there was ample evidence that defendant committed at least three qualifying acts in April through July 19 (he hugged her at least weekly, and once touched her thighs), there was no substantial evidence that at least three months elapsed between the first and third of such acts.

Relying on C.'s testimony referring to the hugging having begun in 2000 or 2001 and the thigh touching having occurred in 2001, respondent appears to argue that there was substantial evidence to prove that the three-month requirement was met. As we have already explained, however, that evidence is not the type of reasonable, credible and solid evidence required to support a conviction.

Assuming that the hugs began in April 2002, respondent argues that "[t]he only possible way that the three-month period was not met [before [C.]'s birthday on July 20, 2002] would be to assume that the touching did not begin until the end of April, and there is absolutely no rational reason to make that assumption." Respondent misses the point. Because there is no evidence as to when in April the hugging began, the jury could not reasonably infer that the hugs began early enough to satisfy the three-month requirement before C.'s 14th birthday on July 20. The evidence is insufficient to support defendant's conviction of violating section 288.5 not because of an unwarranted assumption that the touching did not begin until the end of April, but because there is absolutely no evidence to prove that it began before that. We therefore must reverse defendant's conviction on count 1.[7]

III. *Instructional Errors as to Count 9 – Forcible Sodomy of R. (§ 286, subd. (c)(2))*

With regard to his conviction in count 9 of forcibly sodomizing R., defendant contends that the trial court erred in failing to instruct the jury: (1) on the requirement of jury unanimity, (2) on the doctrine of withdrawn consent, and (3) on lesser included offenses. We find no instructional error.

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[7] Because we conclude that substantial evidence does not support the conviction on count 1, we do not discuss defendant's contention that the trial court erred in failing to instruct on lesser included offenses on that count.

A. *Background*

1. *Evidence of Forcible Sodomy*

R. testified in relevant part that defendant sodomized her in June or July of 2006. Defendant told her that putting his finger in her anus was not enough to show her the pain that accompanied sex, and he wanted to demonstrate it better by inserting his penis. R. was "very scared and . . . didn't really want to do that. But . . . he used his smart words to try to convince [her]." He talked to her about her need to sacrifice and to learn that sex was not all pleasure but also involved pain. R. was also concerned about defendant's position in the church and his opinion of her. She wanted to earn his favor and be included in the group of church children that included his children.

In response to R.'s hesitation, defendant told her that if she started to feel pain, he would stop. R. agreed. They went into a room adjacent to the sanctuary. Defendant had R. remove her pants and underwear and bend over a staircase. He then put his penis in her anus. R. felt pain and told him so. Rather than stopping, defendant asked, "Can you stand it?" After a moment, and with hesitation in her voice, she answered yes, even though she did not want him to continue. Defendant then pushed deeper, increasing the pain. After five to ten seconds, he withdrew.

2. *Prosecution Argument*

In her argument, the prosecutor stated that the issue of consent was only applicable to the forcible sodomy charge in count 9, and that the forcible sodomy charge was "where the biggest argument lies." The prosecutor first reviewed R.'s testimony concerning her consent, noting R.'s reluctance and defendant's control over R.'s life. The prosecutor stated in relevant part: "So when he says I need to teach you a lesson, . . . I need to teach you that this is going to hurt. She

reluctantly [said], 'I don't think I want to do that.' And he said, 'I will make a deal. . . . This is the deal. You allow me to put my penis in your rectum, and when you tell me it hurts, I will take it out.' Well, he is her pastor. He holds her whole moral life in his hands. He is the person she looks up to. He is a big man. She is alone in a room with him. She is a kid. And not only is she a kid, she is a very sheltered kid. She has no experience with this. So she says, all right. He put his penis in her rectum. She says – and I very clearly asked her this, did you think that when you said the words 'it hurts,' that he was going to take it out? She said, yes. That was the agreement. He didn't take it out. He waited a few seconds and said, 'can you stand it?' And being a truthful girl, she answered the question. This wasn't an amendment to the deal they had already made. She answered his question. 'I can stand it.' And he pushes in harder. It's almost as if a second sodomy occurred."

The prosecutor next referred to the law on withdrawal of consent. She stated: "Now, what the law says is that even if you're in the act of a sexual act, such as sodomy, the minute the other party, in this case [R.], says 'stop,' if you don't' stop, it is a crime. That's what the law says. She says 'stop. It hurts.' That was the agreement. And he didn't."

However, having referred to withdrawal of consent, the prosecutor then presented an example that illustrated not withdrawal of consent, but an act exceeding the scope of consent. She also argued that defendant's conduct exceeded the "deal" he had made with R. She stated: "If you were putting a pool in your house, and you had a contractor, and the contract said for $30,000 you're going to get a pool that's . . . 40 feet long and 15 feet wide, . . . there is no contract about a pool that is 65 feet long. So they are digging the pool, and the contractor [asks] why don't we dig it another 15 feet [and] put in a spa[?] And you say, well,

how much does that cost? And he doesn't say anything. He just goes out there, digs the hole, puts in the spa, and hands you a bill for an extra $35,000. Was that a contract to build that spa? All you wanted to do is find out how much that cost. She [R.] was only answering a question. She didn't give him permission to then go forward and keep sodomizing her. They had a deal. This is a deal. . . . [T]he deal was, you can stay in until it hurts. The minute it hurts, you have to take it out. And he didn't do that. He pushed on further."

Finally, the prosecutor argued, in substance, that R.'s consent was not freely given, because it was obtained by duress and fear for her own salvation. The prosecutor argued: "There is another theory under which you can find that this was a forcible act, and that is duress. Her moral life [was] in his hands. She is worried about her place with God. More important, I think to both these girls, than their physical well being is that they can become good Christians, they can become saved. He's got that in his hands. He has made almost everybody in that church totally obedient to his will. So she says, all right, I will let you do it with this stipulation. But she doesn't say it of her own free will. This isn't like two consenting adults. . . . This is the person [whom] she must obey, because if she doesn't, she cannot be what her heart's desire is, and that is to be a good Christian. So there is a theory for duress, and there is also a theory for fear, because she also fears not for her physical life so much, but she fears for her spiritual life, which to her was everything."

3. *Defense Argument*

On the issue of consent, defense counsel argued that the entire incident was consensual: "When he said, 'If you're not comfortable, I will stop. Tell me and I will stop,' she talked about it right there. She talked about she contemplated that.

. . . She knew that she would have a penis in her rectum. She knew that was going to happen. And she said when she started to feel pain, she told him. She didn't say 'stop.' Had she said 'stop,' then we would be talking a whole different situation. She said, 'I'm feeling a little pain.' . . . He said, after that, 'Can you stand it? Can you stand it?' And so she said, 'I said yes. I thought about it and, yeah, I could stand it. So I said yes.' . . . And I don't believe that the pain involved is what we're talking about in terms of the force, the forcible sodomy situation. If you feel any pain, tell me and I will stop. And he did. Because she said she could stand it. . . . It wasn't that bad. It was fine. She could stand it. So she said yes."

4. *Instructions Given*

Following the completion of argument, the court instructed the jury. With respect to count 9, the court instructed pursuant to CALCRIM No. 1030, which informed the jury in part that the prosecution had to prove that "1. The defendant committed an act of sodomy with another person; [¶] 2. *The other person did not consent to the act*; and [¶] 3. The defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone." (Italics added.) On the issue of consent, the jury was informed that "[i]n order to consent, a person must act freely and voluntarily and know the nature of the act."

Immediately after the court finished reading the instructions, the prosecutor told the court at sidebar that she had made "a major mistake" in assuming that language on withdrawal of consent was included in CALCRIM No. 1030. She noted that "It states it in the rape instruction [CALCRIM No. 1000] [a]nd I would

ask the court to so instruct the jury."[8] The court stated that it was "not going to give them further instructions."

B. *Jury Unanimity*

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "On the other hand, where the evidence shows only a single discrete crime . . . was committed . . . , the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Id.* at p. 1132.)

Defendant contends that the trial court erred in failing to give a unanimity instruction as to the charge of forcible sodomy. According to defendant, such an instruction was required because the prosecutor argued that the jury could convict on two separate and distinct acts: (1) defendant's initial penetration, accomplished by force, duress, or fear, and (2) his deeper penetration after R. said that the initial penetration hurt.

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[8] CALCRIM No. 1000, which defines forcible rape, includes language regarding withdrawal of consent. The instruction states in relevant part: "A woman who initially consents to an act of intercourse may change her mind during the act. If she does so, under the law, the act of intercourse is then committed without her consent if: [¶] 1. She communicated to the defendant that she objected to the act of intercourse and attempted to stop the act; [¶] 2. She communicated her objection through words or acts that a reasonable person would have understood as showing her lack of consent; and [¶] 3. The defendant forcibly continued the act of intercourse despite her objection." Although such language does not appear in CALCRIM No. 1030 defining forcible sodomy, the bench notes for that instruction suggest that if an issue regarding withdrawal of consent arises, the withdrawal-of-consent language of CALCRIM No. 1000 may be adapted. (1 Judicial Council of California Criminal Jury Instructions 2009-2010, p. 842.)

Defendant misconstrues the evidence and the prosecutor's argument. There was only a single discreet act of sodomy. "Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).) When such an act "is accomplished against the victim's will by means of [inter alia] force [or] duress," then the act violates section 286, subdivision (c)(2).

Defendant penetrated R. only once – a single, discreet act of sodomy. The prosecutor argued three theories on which that discrete act was non-consensual: that defendant's conduct exceeded any acquiescence R. may have given; that any such acquiescence was withdrawn; and that R.'s cooperation was obtained by duress and fear. That the single discreet act of sodomy might have been non-consensual on more than one theory did not require a unanimity instruction.

Moreover, the "'[t]he unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction.'" (*People v. Benavides* (2005) 35 Cal.4th 69, 98.) Here, even if there were two different acts – initial penetration, and subsequent penetration – they were all part of one continuous incident. The evidence as to the entire incident was undisputed, and there was no reasonable basis on which the jury could find that the initial penetration occurred but the subsequent penetration did not. Defendant pursued the same defense with respect to the entire incident – that the sodomy was consensual because R. agreed to the initial penetration, and because, although she said that she felt pain, she did not tell defendant to stop. We conclude that a unanimity instruction was not required.

C. *Withdrawal of Consent*

Defendant contends that the trial court erred in failing to instruct the jury on the doctrine of withdrawn consent. He is mistaken.

The trial court has a sua sponte duty to instruct the jury "on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) On the other hand, absent a request by the defense, the court has no duty to give "pinpoint instructions" – instructions that "relat[e] specific facts to the elements of the offense" in support of a defense. (*People v. Barton* (1995) 12 Cal.4th 186, 197.)

Defendant contends that the trial court erred in denying the prosecutor's request for an instruction on withdrawn consent, "because the jury had a right to know the actual law governing withdrawal of consent, not the prosecutor's biased and incorrect version of the law, and, if properly instructed, the jury could have acquitted defendant of forcible sodomy." We know of no basis on which defendant can argue on appeal that the court erred in denying the *prosecutor's* instructional request – a request in which defendant did not join.

Defendant next argues that the court had a sua sponte duty to instruct on withdrawn consent. Section 286, subdivision (c)(2), requires that the act of sodomy be "accomplished against the victim's will," meaning without the victim's consent. (See *People v. Key* (1984) 153 Cal.App.3d 888, 895 [involving rape].)[9]

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[9] As to R., the prosecution did not charge defendant with sodomy of a child under the age of 18 in violation of section 286, subdivision (b)(1), or proceed on such a charge as an alternative count. That crime does not require a lack of consent. The prosecution *did* charge defendant with violating that section in count 4 with respect to C.

In the analogous context of forcible rape, the California Supreme Court held in *In re John Z.* (2003) 29 Cal.4th 756, 760 (*John Z.*), that "the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection." The court observed that "'it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.'" (*Id.* at p. 762.) In *John Z.*, substantial evidence showed that the victim "withdrew her consent and, through her actions and words, communicated that fact to defendant," and that "no reasonable person . . . would have believed that [the victim] continued to consent to the act." (*Ibid.*) Because the case involved a juvenile adjudication rather than a jury trial, and because the briefing did "not address what pinpoint instructions, if any, might be appropriate in these withdrawn consent cases," the court did not "explore or recommend instructional language governing such matters as the defendant's knowledge of the victim's withdrawal of consent, the possibly equivocal nature of that withdrawal, or the point in time at which defendant must cease intercourse once consent is withdrawn." (*Id.* at p. 763.)

Even assuming that the doctrine of withdrawal of consent is generally within the court's sua sponte duty to instruct if the issue is raised by the evidence, in the instant case there was no substantial evidence to support such an instruction. The undisputed evidence showed that R. verbally agreed to the act of sodomy, based on defendant's representation that he would stop if it hurt. During the act, she said that it hurt. But when defendant asked about the pain, she did not tell defendant to stop; she said she could stand it.

This evidence does not demonstrate a withdrawal of consent. It demonstrates, at most, that defendant's conduct exceeded the scope of consent –

that is, defendant went beyond the agreement that permitted him to sodomize R. until it hurt. The only question was whether R., in telling him she could stand the pain, effectively amended her consent to allow defendant to continue. But exceeding the scope of consent is different from a withdrawal of consent as envisioned in *John Z.* A withdrawal of consent requires that the victim "express[] an objection and attempt[] to stop the act." (*John Z., supra,* at p. 760.) Here, there was no substantial evidence that R. expressed an objection and attempted to stop the act, as opposed to defendant exceeding the scope of R.'s consent. Therefore, the trial court had no duty to instruct on withdrawal of consent.

It is true that the prosecutor argued that R. withdrew her consent. But defendant did not object to that argument, and therefore he has forfeited any claim that the argument was improper. (*People v. Arias* (1996) 13 Cal.4th 92, 159.) Moreover, that the prosecutor argued a factually unsupported theory does not require setting aside the conviction. "[W]hen a prosecutor argues two theories to the jury, one of which is factually sufficient and one of which is not, the conviction need not be reversed, because the reviewing court must assume that the jury based its conviction on the theory supported by the evidence." (*People v. Seaton* (2001) 26 Cal.4th 598, 645 (S*eaton*).) Thus, "the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

Here, nothing in the record suggests that the jury convicted defendant solely on the unsupported theory of withdrawn consent. Further, in a prosecution under section 286, "'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."

(§ 261.6.) The evidence that R. did not freely and voluntarily agree to the sodomy, but rather acted under duress, was overwhelming.

R. was an unsophisticated, home-schooled 15-year-old girl. Defendant was the pastor of her church. He exercised inordinate spiritual and mental control over church members. According to Rudy Segura, a member of the church, after becoming pastor defendant exercised firm control over church members and their activities by passing judgment on what might offend God and their religion. According to Ernesto Granados, another church member, defendant expected strict obedience from all church members in every aspect of life, and failure to obey would result in ostracism within the church community. Defendant exercised similar control over R. Before the sodomy, he had used his position of spiritual control over R. to engage in a pattern of increasingly invasive sexual acts, from fondling her breasts to vaginal penetration. In the sodomy incident itself, he took advantage of R.'s young age and inexperience by misleading her into believing that it was necessary for him to penetrate her anally in order to demonstrate that sex involved pain as well as pleasure. R. reluctantly agreed to let him penetrate her not as an exercise of free will, but because of his position with the church, because she wanted to please him, and because she feared that if she refused he might exclude her from associating with his children, who were her only friends in the church.

This evidence was more than sufficient to prove that R. did not freely and voluntarily agree to the sodomy, but rather did so because of duress, i.e., because of an "implied threat of . . . hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to . . . acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 (*Pitmon*); see *People v. Leal* (2004) 33 Cal.4th 999, 1001 (*Leal*)

[reaffirming *Pitmon* definition of duress in prosecution for forcible lewd conduct under § 288, subd. (b)(1)].)[10]

Instruction on Reasonable Belief in Consent

Defendant contends that the trial court erred in failing to instruct on a defense of reasonable but mistaken belief in consent. According to defendant "[o]nce the prosecutor elected to obtain a sodomy conviction based on post-penetration failure to withdraw, and purported to instruct the jury on 'the law' focusing solely on R.'s beliefs and intent, the trial court had a duty to instruct on the law of consent-withdrawal, including principles governing mistake of fact as to consent." Defendant asserts that the factual basis for an instruction on reasonable but mistaken belief in consent was R.'s purportedly equivocal withdrawal of consent.

As we have held, the trial court had no duty to instruct on withdrawal of consent. Thus, it likewise had no duty to instruct on a reasonable but mistaken belief that R. did *not* withdraw her consent. More importantly, a reasonable but mistaken belief in consent was not a viable defense to the charge of violating section 286, subdivision (c)(2). "[R]egardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse [or, in the instant case, sodomy], that belief must be formed under circumstances society will tolerate

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[10] Defendant contends that the definition of "duress" found in section 261, subdivision (b), which applies to rape, should be applied to prosecutions for sodomy in violation of section 286, subdivision (c)(2). However, the definition of duress found in section 261, subdivision (b), applies only to prosecutions under section 261. (See *Leal, supra,* 33 Cal.4th at p. 1007 [statutory language "belies any legislative intent to apply the definitions of 'duress' in the rape and spousal rape statutes to any other sexual offenses"].) It therefore does not apply to section 286, subdivision (c)(2). Rather, the judicial definition of duress first established in *Pitmon* applies.

as reasonable in order for the defendant to have adduced substantial evidence giving rise to" an instruction on a reasonable, but mistaken belief in consent. (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Here, defendant knew R. was a minor. His sodomizing her, even with her consent, constituted a crime – a violation of section 286, subdivision (b)(1), which in relevant part makes it an alternative felony/misdemeanor for "any person [to] participate[] in an act of sodomy with another person who is under 18 years of age." Thus, because defendant's conduct was illegal regardless of whether R. consented, defendant's belief in consent did not exist under circumstances society will tolerate as reasonable, and did not justify an instruction on mistaken belief in consent.

Instructions on Lesser Included Defenses

Defendant contends that the trial court erred in failing to instruct on battery, assault, assault with intent to commit sodomy, and attempted forcible sodomy. We disagree. The trial court must instruct on lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)
On the evidence presented, defendant committed a completed act of sodomy. That act either violated section 286, subdivision (c)(2), or it did not; but there was no substantial evidence that would have permitted conviction of lesser included offenses. In any event, any error in failing to instruct on lesser included offenses was not prejudicial. (*Breverman, supra,* 19 Cal.4th at p. 165.) As we have explained, the evidence that defendant accomplished the act of sodomy by duress was undisputed and overwhelming. Thus, even if the court had instructed on lesser

included offenses, it is not reasonably probable that a different result on count 9 would have been reached. (*Ibid.*)

IV. *Sufficiency of the Evidence*

Defendant contends that the evidence was insufficient to prove his guilt of violating section 286, subdivision (c)(2). He is incorrect.

The statute is violated if the defendant commits sodomy without the victim's consent and accomplishes the act by, inter alia, duress. Duress is defined as "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 50; see *People v. Leal, supra,* 33 Cal.4th at p. 1001 [reaffirming *Pitmon* definition of duress].) Here, as we have already explained, the evidence was sufficient to prove that defendant accomplished the act of sodomy by an implied threat of hardship or retribution sufficient to make R. acquiesce to an act of sodomy to which she would not have otherwise submitted. Therefore, the evidence was sufficient to prove defendant's guilt of violating section 286, subdivision (c)(2). Because the evidence was sufficient on this theory, we need not discuss any other theories of guilt. (See *Seaton, supra,* 26 Cal.4th at p. 645.)

DISPOSITION

The conviction on count 1 is reversed. The judgment is otherwise affirmed. The case is remanded for resentencing in light of the reversal of count 1.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.